



POLICE DEPARTMENT CITY OF NEW YORK

June 9, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer James Lagaris
Tax Registry No. 945224
Transit Bureau District 11
Disciplinary Case No. 2015-13309

Police Officer Robert Santangelo
Tax Registry No. 920806
49th Precinct
Disciplinary Case No. 2015-13305

Charges and Specifications:

Disciplinary Case No. 2015-13309

1. Said Police Officer James Lagaris, on or about January 12, 2014, at approximately 0245 hours while assigned to the 49th Pct. and on duty, in the vicinity of [REDACTED] used excessive force in that he unnecessarily used pepper spray against individuals.

P.G. 212-95 - USE OF PEPPER SPRAY, Page 1, Paragraph 1

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P.G. 212-95 - USE OF PEPPER SPRAY, Page 1, Paragraph 1

Appearances:

For CCRB-APU: Jonathan Fogel, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For the Respondents: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street-Suite 640
New York, New York 10038.

Hearing Dates:

March 3, and March 4, 2016

Decision:

Guilty

Trial Commissioner:

ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on March 3 and 4, 2016. Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. CCRB called Leanis Gloria Diaz as a witness. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Lagaris Guilty and Respondent Santangelo Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the facts that are undisputed. On January 12, 2014, Respondent Officer James Lagaris was assigned to the 49th Precinct and was working a 2315 to 0750 patrol tour with his partner, Officer Ryan Conroy¹. Respondent Officer Robert Santangelo, also assigned to the 49th Precinct, was working a 2315 to 0750 patrol tour (T. 131-133, 239-240).

Beginning on the evening of January 11, 2014 and continuing into the early morning hours of January 12, 2014, Leanis Diaz hosted a birthday party at her apartment located at [REDACTED]

¹ Conroy has since been promoted to the rank of Sergeant.

██████████. At approximately 0230 hours on January 12, 2014, Diaz's front apartment door was open as a number of guests were leaving the party (T. 23, 30; CCRB Ex. 1).

At about that time, Respondent Lagaris and his partner, Conroy, were in the vicinity of ██████████ in their patrol car. Respondent Lagaris and Conroy approached ██████████ and spoke with Diaz, requesting that the music coming from inside her apartment be turned down. There is no evidence that Respondents were responding to a noise complaint at that location. At some point thereafter, a confrontation between Respondent and Diaz ensued on the steps leading to the apartment's front door and Conroy entered the apartment. Respondent Lagaris eventually entered the apartment behind Conroy (T. 35, 133-140).

Shortly thereafter, a "10-85" request for backup was made over the radio and additional police officers arrived on the scene, including Respondent Santangelo, who also entered the apartment. Both Respondent Lagaris and Respondent Santangelo discharged their pepper spray while inside. Fourteen individuals inside the apartment, ranging in age from 10 months to 64 years old, were subsequently treated at ██████████ for exposure to pepper spray (T. 18, 129, 140-141, 143, 240).

Two video recordings were admitted into evidence at trial which depict portions of the incident that morning. The first video (CCRB Ex. 2) is a two minute, 19 second recording depicting the part of the encounter which transpired in the entryway of Ortiz's apartment. The video was recorded by someone standing in the apartment's living room looking out into the entryway area. At the start of the video, Conroy is already inside the apartment and Respondent Lagaris is standing right behind him, but only partially in the apartment. Both he and Respondent Lagaris appear to be trying to push further into Diaz's apartment while an unknown number of people further inside are yelling and blocking the officers' entry. Approximately 28

seconds into the video, Conroy is seen grabbing the wrist of a man wearing a red shirt and appears to be struggling to pull him out of the apartment. At 1:46 into the video, Conroy and Respondent Lagaris exit the frame and additional officers, including Respondent Santangelo, are seen entering the apartment. Shortly thereafter, a voice can be heard asking "Did they spray something?" The video then ends with a continued struggle in the entryway.

The pertinent portion of the second video (CCRB Ex. 3) was recorded by an individual in the kitchen. Conroy can be seen grabbing and pulling the wrist of an individual and struggling to pull the individual out of the kitchen. Respondent Santangelo then enters the kitchen and is heard yelling about wanting "the guy in the red shirt." Approximately two minutes after the recording begins, the officers exit the apartment.

The actual discharge of pepper spray by either Respondent is not shown in either video recording.

Diaz testified at trial that on the evening of January 11, 2014 and continuing to the early morning of January 12, 2014, there were approximately 20 adults, and a few children, in her apartment celebrating her [REDACTED]'s birthday. At approximately 0230 hours, she was saying goodbye to some of her guests when someone told her that the police were outside. She then went to see what was going on. A police officer outside the apartment told her that he could hear the music coming from her apartment all the way down [REDACTED]. She responded by saying, "No problem. I'm turning it off," and went inside to turn off the music. Diaz testified that by the time she had turned off the music and was walking back toward the front door, one officer was about one or two feet inside her apartment and another, identified at trial as Respondent Lagaris, was standing behind him on the steps outside the apartment. According to Diaz, she asked the officer in her apartment what the problem was because the music had been

turned off. The officer then demanded her driver's license, which she refused to give to him and instead told him to call his sergeant to the scene. Diaz described the officer as having "a scary glare" in his eyes as he reached over to her, grabbed her left arm and attempted to pull her outside onto the street. At that point, Diaz testified that her brother, Person A, pulled her right arm to keep her from being pulled outside. As Diaz was being pulled by both her brother and the officer, Respondent Lagaris entered into the apartment. Person A pulled his sister further into the apartment by the living room and stood in front of her as he tried to guard her from Conroy and Respondent Lagaris. The officers then started trying to pull Person A outside. Most of the other guests were in the kitchen at that point (T. 23-24, 32-40).

Diaz recounted that although the officers tried to pull both her and her brother outside of the apartment, there was no shoving match or pushing occurring between the party guests and the officers, nor did she observe anyone grab or strike the officers. However, she and many of the guests were yelling at the officers to get out of the apartment because they felt that the officers did not have a right to be there. Diaz testified that she continued asking the officers to call their sergeant. The officer then took out his pepper spray and sprayed it from a distance of about four to six feet. Although Diaz testified that she was hit mostly with fumes from the pepper spray because she had been standing behind her brother in the living room doorway, everyone else in the apartment was hit. There was a lot of commotion as everyone rubbed their eyes and ran toward the kitchen sink to put water on their faces. Ms. Diaz testified that Respondent Lagaris was not the officer who discharged the pepper spray (T. 40-46).

Diaz testified that additional officers arrived and entered the apartment, including Respondent Santangelo, who barged in aggressively, screaming about wanting "the guy in the red shirt." Thereafter, a number of police officers pulled her other brother, [REDACTED] out of

the apartment. Diaz testified that she was also taken outside and handcuffed for approximately 20 minutes, before being released and not charged (T. 47-53).

Respondent Lagaris testified at trial that on January 12, 2014, he and Officer Conroy had been investigating a number of 311 noise complaints. As they travelled eastbound on [REDACTED], they heard very loud music and drove in the direction the music was coming from a few blocks away. They eventually arrived at [REDACTED], for which no noise complaint had been lodged. When Respondent Lagaris and Conroy pulled up in their patrol car, he saw a few people standing outside an apartment door with loud music coming from inside. At first, they stayed in their patrol car and asked the individuals standing outside the apartment to lower the music. Respondent Lagaris testified that at that point, they were not planning on issuing a summons for noise (T. 134-136). The individuals to whom Conroy had spoken refused to turn down the music (T. 156).

Respondent Lagaris and Officer Conroy then exited their patrol car and approached the individuals standing outside the apartment. Officer Conroy stood on the top step leading in front of the apartment door as he spoke to an individual who was just inside the threshold of the apartment. Respondent Lagaris was unable to hear the conversation between Conroy and the individual in the apartment. He testified that he stood behind and to the side of Conroy, until it appeared that he was being dragged into the apartment. At that point, he held onto Conroy and went into the apartment after him (T. 137-140).

Respondent Lagaris testified that he was standing about one foot inside the apartment and could see about 10 people standing in the kitchen who were yelling and appeared angry. He used his radio to summon his patrol supervisor to the scene, after which he lost visual contact with

Conroy. Respondent Lagaris then used his radio again to call in a "10-85" request for assistance. Additional officers arrived within minutes (T. 141-144).

According to Respondent Lagaris, he was standing in front of the kitchen and had lost sight of Conroy (T. 145). He took out his pepper spray because there were a lot of people in the apartment who were becoming increasingly aggressive and there was "body contact." It also seemed like the apartment door behind him was going to close. In an effort to "buy some time" he discharged his pepper spray for one to two seconds (Id.). Respondent Lagaris testified that he did not aim the pepper spray at any one person, instead he sprayed across the entire room, going from one side to another (T. 228-229). According to Respondent Lagaris, he had received training during his time in the police academy on the use of pepper spray, but January 12, 2014 was the first time he had used it during the course of his duties (T. 133-134). He testified that he used his pepper spray because it was the lowest form of force he could have employed at the time (T. 146). He further testified that he was initially unaware that pepper spray had been used by another officer at the scene (Id.).

On cross-examination, Respondent Lagaris testified that as he stood on the front steps to the apartment, he believed there to be approximately 15 to 20 people inside (T. 160). He did not see any children at the time (Id.). Respondent Lagaris testified further that once he entered the apartment, he lost visual contact with Officer Conroy until he discharged his pepper spray (T. 164). Respondent Lagaris further conceded that when he entered the kitchen and saw approximately 50 people inside the apartment who were yelling, he felt outnumbered and afraid (T. 220-221).

Respondent Santangelo testified at trial that at approximately 0245 hours, he responded to a "10-85" radio transmission at the corner of [REDACTED]. There were two

patrol cars already at the scene when he arrived and he saw Respondent Lagaris standing on the second step of a doorway. He ran over and asked Respondent Lagaris what was going on. Respondent Lagaris told him that they were attempting to get an individual out of the apartment. Respondent Santangelo looked into the apartment through the open door and saw Conroy, 4 5 feet inside the apartment towards the left, as well as five to six civilians (Tr. 240-243).

Respondent Santangelo testified that as he and the other officers on the scene were trying to get into the apartment, a struggle for control of the door ensued and he felt the door being pushed closed. He could also see Officer Conroy inside being "jostled around," and at one point, Officer Conroy's back hit a glass cabinet. Respondent Santangelo described the jostling as "a jerky movement back and forth...where he would stumble back and go forward and stumble back." According to Respondent Santangelo, the combination of seeing Officer Conroy hit his back against the glass, the jostling, and the door closing caused him to fear for Officer Conroy's safety. As a result, Respondent Santangelo testified that his focus shifted to making sure Officer Conroy was safe (T. 243, 254).

Respondent Santangelo testified that in 1998 and 1999, he was trained in crowd control tactics and received training on the use of pepper spray over a wide area to control a disorderly group. While still outside the apartment on the steps, he took out his pepper spray, extended his right arm into the doorway area and discharged the pepper spray for about two seconds, blanketing the area inside. He did not see any children and did not consider anyone in the apartment at the time to be elderly. According to Respondent Santangelo, the spray allowed him and the other officers to gain entry into the apartment and reduced the resistance coming from the other side of the apartment door. Respondent Santangelo testified that he then went into the kitchen, there was a lot of yelling and he was confronted by an individual who was grabbing onto

his uniform and arm. Shortly thereafter, a sergeant ordered him to withdraw from the apartment (T. 243-247, 252, 262).

On cross-examination, Respondent Santangelo testified that the apartment door was mostly closed before he discharged his pepper spray and he only had an angle of about 45 to 50 degrees into the apartment that he was able to spray. Once he discharged his pepper spray, however, the door opened completely (T. 258-260). Respondent Santangelo described his method of deployment of the pepper spray as a "blanket spray," because "it wasn't at any particular person; it as an area spray" (T. 262).

The issues in this case are: (1) whether Respondent Lagaris used pepper spray unnecessarily; and (2) whether Respondent Santangelo used pepper spray unnecessarily. Based upon the credible relevant evidence in the record, I find that they each did so.

The use of pepper spray by members of the service is governed by Patrol Guide Section 212-95, which sets forth, in pertinent part:

Use of pepper spray is proper when used in accordance with Article 35 of the Penal Law and Department procedures.

* * * *

O.C. pepper spray may be used when a member reasonably believes it is necessary to effect an arrest of a resisting suspect, for self-defense or defense of another from unlawful force, or to take a resisting emotionally disturbed person into custody.

(P.G. 212-95).

The Notes to section 212-95 caution:

Avoid discharging pepper spray indiscriminately over a large area for disorder control. (Members who are specifically trained in the use of pepper spray for disorder control may use pepper spray in accordance with their training, and within Department guidelines, and as authorized by supervisors)(italics in original). (Id.).

Penal Law Article 35 addresses the lawful use of force by citizens and police officers:

A person may, pursuant to the ensuing provisions of this article, use physical force upon another person in *self-defense or defense of* a third person, or in defense of premises, or in order to prevent larceny of or criminal mischief to property, or in order to effect an arrest or prevent an escape from custody (italics in original).

(P.L. § 35.10).

A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest.

(P.L. § 35.30).

I credit the testimony of Diaz as truthful to the extent that she admitted that she was asked to turn down the volume of the music in the apartment, returned to Officer Conroy at the front door and subsequently balked when he asked her for identification. This version of events is against her penal interest and I find it to be reliable. I further credit Diaz's testimony that Conroy grabbed her arm and that Diaz's brother grabbed her other arm to prevent Conroy from removing her from the apartment. I find it likely that Diaz's brother's pulling her back into the apartment, combined with Conroy's continued hold on Diaz, led to the appearance of Conroy being pulled into the apartment, as Respondent Lagaris testified.

I further find that CCRB Exhibits 2 and 3, while certainly relevant evidence, have little probative value with respect to the central issue of this case, ie., whether or not the use of pepper spray was justified. Neither recording depicts the instant when either Respondent used the pepper spray each admitted to using. CCRB Exhibit 2, however, does depict Respondent Santangelo holding something in his right hand which resembles a pepper spray canister. What the video recordings do show is that Respondents entered into a private residence which held a number of party-goers and that they did so in a confrontational manner.

While neither Respondent has been charged with a violation of Patrol Guide Section 214-23, dealing with entry into premises in connection with noise complaints, the regulation is instructive. Section 214-23 provides, in relevant part, that officers investigating excessive noise issues:

1. Interview complainants/violators about noise complaint e.g., people yelling, dogs barking, etc.

2. Determine if the noise is unreasonable.

NOTE The best guideline to follow in determining whether the noise is unreasonable is to determine whether the ordinary person in the community is actually disturbed by the noise. In addition, the following factors should be considered:

a. The character of the neighborhood or area, i.e., residential, commercial;

b. The ordinary noise level of the area, i.e., busy Manhattan streets will likely always have high ordinary sound levels;

c. The time of day;

d. The number of persons complaining about the noise; and,

e. Whether the person responsible for the noise has been asked by others to cease or lower the sound level and has refused to do so.

3. Attempt to correct the condition by warning violator.

4. Serve Environmental Control Board Notice of Violation for violation of Administrative Code Section 24-218 if unable to correct condition and violator is eligible.

* * * *

The decision to forcibly enter into private or semi-private premises to correct noise complaints will ONLY be made by a precinct commander/duty captain and ONLY as a last resort, after requests to stop the noise have been ignored (capitalization in original).

(P.G. § 214-23). Based upon the absence of evidence in the record supporting a finding that Diaz was given an opportunity to correct the condition and refused to do so, Conroy's apparent decision to effect an arrest by physically seizing Diaz and removing her from her apartment appears to have been premature. Furthermore, the decision to enter the apartment for the purpose of arresting Diaz without the prior approval of the 49th Precinct Commander was outside Respondents' authority.

I credit the testimony of each Respondent as truthful and candid. I am struck by the difference between the environment inside the apartment described in Respondents' testimony and the same environment depicted on video recordings offered in evidence by CCRB. I find that Respondents' operated based upon their subjective perceptions of the situation rather than attempting to conform their actions to what was objectively reasonable and authorized by the Patrol Guide.

Neither Respondent testified to any facts regarding their separate uses of pepper spray which could objectively support a theory of its use, either in self-defense or in order to effect an arrest. While both Respondents expressed legitimate concern for Conroy's safety, it is not helpful that they seek to justify the use of pepper spray in a circumstance in which they sought to enforce a relatively minor quality of life regulation, which did not cry out for police action. Their actions illustrate in dramatic form the perils attendant to such an entry, which is likely the reason that the approval of such an enforcement action is made at the level of the Precinct Commander (see P.G. § 214-23).

There is further no evidence of tumultuous behavior by the party guests which may have justified a more aggressive posture by Respondents. Respondent Lagaris essentially admitted that he used the pepper spray because he was worried that the people inside the apartment might attack him. While the persons inside the apartment openly expressed their desire for Respondents to leave the apartment and questioned the legitimacy of their actions, there is no evidence in the record that any of the occupants of the apartment attempted to assault Respondent Lagaris, Officer Conroy or any other police officer. While there is evidence in the record that both Respondents observed Conroy apparently stumble into a glass cabinet, the video recording of that stumble does not support a theory that someone pushed him into it. The video

recording clearly shows Conroy advancing through a crowd of people and the temporary loss of his footing is equally susceptible of an innocent interpretation.

Despite Respondent Lagaris' testimony that at one point he perceived that some aerosol agent was used against him, it appears that the only use of aerosols was police use of pepper spray. It may well be that Respondent Santangelo's use of pepper spray was the source of Respondent Lagaris' perception but the record is unclear on this point.

Similarly, while Respondent Lagaris testified that he was attempting to assist Conroy in the arrest of the man in the red shirt, neither his testimony nor the video recordings set forth how his use of pepper spray was connected to that effort. The use of pepper spray must be analyzed with respect to the threat each individual poses with respect to a police officer. Assuming for the sake of argument that the man in the red shirt had presented a physical threat such that the use of pepper spray against him would have been lawful, that circumstance certainly would not legitimize the use of pepper spray against every person who stood between Respondents and that single suspect. Respondent Lagaris' interpretation of the operative Patrol Guide language, "in order to effect an arrest," is so attenuated as to render the limitation meaningless. Moreover, his deployment of the pepper spray over a wide area, against several people, violated the prohibition against using pepper spray indiscriminately. Accordingly, Respondent Lagaris' use of the pepper spray violated the Patrol Guide.

Similarly, Respondent Santangelo admitted that he used his pepper spray against parties on the other side of the front door to the apartment, who he could not see, in order to deter them from closing the door with him on the other side of it. This use, despite his professed state of mind, was indiscriminate and violated the Patrol Guide. As set forth above, there is no evidence in the record that, in accordance with the Patrol Guide, he used the pepper spray in defense of

himself or another officer, nor is there evidence that he used it appropriately while attempting to effect an arrest. Respondent Santangelo's observation of Conroy stumbling may have warranted a heightened sense of awareness on his part but does not excuse an overreaction such as the evidence in this case establishes occurred. Thus, his use of pepper spray violated the Patrol Guide.

Both Respondents used their pepper spray as a disorder control agent, such as tear gas, rather than as a personal defense tool. Even if I were to employ the Patrol Guide standard regarding the use of tear gas, such use must be authorized at the Patrol Borough Commander level (see P.G. § 212-92).

Accordingly, I find both Respondents Guilty of the charged misconduct.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondents' service records were examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent Lagaris was appointed to the Department on July 18, 2007 and Respondent Santangelo was appointed on December 8, 1997. Information from their personnel records that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested that each Respondent forfeit five days as a penalty. In a previous negotiated settlement case, a Respondent forfeited 10 days after being found guilty of unlawful use of pepper spray. See *Case No. 2004-79636* (approved 05/17/04)(Twelve-year member with no prior disciplinary record forfeits 10 vacation days for discharging pepper spray without authority. The Respondent was photographed discharging his pepper spray at a crowd during an anti-war demonstration. He sprayed an unidentified man without reason or provocation).

In this case, 14 individuals were treated at a hospital as a result of Respondents' unauthorized and unlawful actions. For illustrative purposes, inasmuch as the use of pepper spray is a form of force, this result is no different from Respondents striking a single blow upon each of 14 individuals. Moreover, this case may be distinguished from one where individuals are inadvertently struck with pepper spray collateral to a single authorized or unauthorized use. Respondent Lagaris testified that he deployed his pepper spray over a wide area, from side to side, and had to have intended to affect several people. Respondent Santangelo testified that he deployed his pepper spray behind a door which prevented him from seeing who may have been on the other side but nevertheless used his spray in a wide area pattern. Either rationale calls for the intentional use of pepper spray to affect multiple individuals; for these reasons, I find CCRB's recommended sanction of five days to be inadequate. A sanction of 14 days, based upon the aggravating factors, is warranted.

While I have found both Respondents' use of pepper spray to have clearly violated the Patrol Guide, I am mindful that they were each motivated, at least in part, to ensure the safety of fellow police officers who were in a dynamic encounter with several citizens. I find this state of mind mitigating because Respondents, though precipitous in their actions, sought to uphold a core value of this Department. I therefore recommend that each Respondent forfeit ten vacation days.

APPROVED


WILLIAM J. BRATTON
POLICE COMMISSIONER

Respectfully submitted,



Paul M. Gamble
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JAMES LAGARIS
TAX REGISTRY NO. 945224
DISCIPLINARY CASE NO. 2015-13309

Respondent's last three annual performance evaluations were as follows: in 2015, he received an overall rating of 3.0 "Competent," in 2014, he received an overall rating of 3.5 "Highly Competent/Competent," and in 2013, he received an overall rating of 4.0 "Highly Competent." [REDACTED]

Respondent has no prior formal disciplinary history.

Paul M. Gamble
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ROBERT SANTANGELO
TAX REGISTRY NO. 920806
DISCIPLINARY CASE NO. 2015-13305

Respondent's last three annual performance evaluations were as follows: in 2015, he received an overall rating of 4.0 "Highly Competent," in 2014, he received an overall rating of 4.5 "Extremely Competent/Highly Competent," and in 2013, he received an overall rating of 4.0 "Highly Competent." He has been awarded 24 medals for Excellent Police Duty and 6 medals for Meritorious Police Duty. [REDACTED]

Respondent has been the subject of two prior adjudications. In 2009, he pled guilty to causing false entries to be made in Department records by entering fictitious pedigree and offense-related information on approximately 20 summonses and repeatedly failing to properly maintain his Activity Log as required. He negotiated a penalty of 30 vacation days, 30 suspension days, and one year dismissal probation.

In 2014, Respondent was found not guilty of entering an apartment without sufficient legal authority.

From August 6, 2009 to September 30, 2010, Respondent was placed on Level 2 Disciplinary Monitoring based on his overall record. On September 22, 2015, Respondent was again placed on Level 2 Disciplinary Monitoring as a result of the instant charges and specifications, which remains ongoing.

Paul M. Gamble
Assistant Deputy Commissioner Trials